The Timing of Dialogue: Slovenian Constitutional Court and the Data Retention Directive

verfassungsblog.de/timing-dialogue-slovenian-constitutional-court-data-retention-directive/

On 3rd July 2014, the Slovenian Constitutional Court struck down Articles 162 – 169 of the Act on Electronic Communications (ZEKom-1) which regulate data retention and were adopted in order to implement the Directive 2006/24/EC. The case is of interest not so much for the legal argumentation presented in the judgment but because of the positioning of the Slovenian court in the Europe-wide judicial response to the Data Retention Directive. In that sense, it's a contribution to the discussion on the role of an individual constitutional court in a multi-level network of courts, especially in cases when a number of constitutional or other high courts in the member states are seized with issues stemming from the same piece of legislation.

The Court was seized by the Information Commissioner *(Informacijski pooblaščenec)*, an independent authority charged with the protection of personal data and access to documents on 5th March 2013. On 26th September 2013, the Constitutional Court stayed the proceedings until the decision of the Court of Justice of the EU in cases C-293/12 (Digital Rights Ireland) and C-594/12 (the referral by the Austrian Constitutional Court) . It asserted that the Information Commissioner was *de facto* challenging the conformity of the Directive with the Charter of Fundamental Rights. The Slovenian Court, in the order with which it stayed the proceedings, first remarked that its own jurisdiction to review domestic measures implementing directive is not out of the question. However, the Court of Justice holds exclusive jurisdiction over the question of the validity of the Directive pursuant to Article 267/1/b of the TFEU. And given that the challenges to the constitutionality of the Slovenian legislative provisions in substance amount to a claim that the provisions of the Directive are not in conformity with Articles 7 and 8 of the Charter of Fundamental Rights, the decision on the validity of the Directive is 'of key relevance' for the review of constitutionality of the domestic legislative provisions (§8).

The Slovenian Court established that the cases on the validity of the Directive (C-293/12 and C-594/12) were pending at that moment; a hearing had been held and the Advocate General has been given a date until which he was to produce an opinion. The Slovenian Court found that it does hence not need to submit a preliminary reference, as the claims against the implementing legislation based on the Slovenian constitution in substance match the reasons considered in the case before the Court of Justice (§9). While the Constitutional Court does not need to submit a reference itself, it must nevertheless wait for the Court of Justice before it passes its own judgment (§10).

The Court of Justice held a hearing on 9th July 2013 and declared the Directive invalid on 8th April 2014. On 3rd July 2014, the Constitutional Court held a session and adopted its decision on the relevant articles of the domestic legislation. It also ordered the operators to destroy all information held on the basis of the annulled provisions immediately after the publication of the Constitutional Court decision.

In the main decision, the Constitutional Court found that with the annulment of the Directive, the obligation of the member state to transpose it into its domestic legal order has ceased to exist. Nevertheless, protection of personal data in electronic communication remains a matter for EU law: Directive 2002/58/EC allows for the Member States to adopt legislative measures encroaching upon the confidence of data in transit, including data retention, when this is necessary, appropriate and adequate in a democratic society to serve a number of legitimate aims (§12). This – in substance – corresponds to the Slovenian constitutional requirement for a proportionality test to be applied when the right to information privacy (Article 38/I Constitution) is encroached upon (§13). The Constitutional Court therefore starts from the premise that the Slovenian legislature is not barred by EU law to adopt measures including data retention when they fulfill the requirements of rule of law under the Slovenian Constitution. Its primary task is therefore to assert whether in the absence of the obligation created for the national legislature by the 2006 Directive, the legislation may nevertheless remain in the legal system – from the view point of the Slovenian Constitution.

The substantive review can then be divided in two essential parts. In the first part, the Constitutional Court

responds to the central claim of the Information Commissioner: that retention of data without any cause on the side of the persons affected is disproportionate. This part, in the words of the Slovenian court, 'matches in substance' the review of the Directive against the yardstick of the EU Charter. In the second part, the Court reviews two features of the implementing legislation that are country-specific.

In the first part of the review, the Constitutional Court relies heavily on the argumentation of the Court of Justice in C-293/12 and C-594/12. It performs a proportionality test, first finding that there is a legitimate aim for the contested measures that can be linked back to the constitutional duty of the State to protect human rights on its territory (Article 5 Constitution) and in that name also prosecute crimes (§§18-19). In finding the measures appropriate, the Court looks not only into the Commission's Evaluation report and the analysis of the Slovenian Government, but also cites the Court of Justice, i.e. its finding that the data retained was a 'valuable tool for criminal investigations'. The Court's handling of the necessity test was influenced both by findings of AG Cruz-Villalon (on the size of the databases and the risk for unauthorized access or abuse; the Court emphasized that the AG's argument was based ECHR case law) as well as the German Federal Constitutional Court in its judgment on data retention (§§24-25).

In the second part of the review, the Constitutional Court addressed the issues that were related to the way the Directive was implemented in the Slovenian legal system. Importantly, the Court found that the Slovenian Government failed to justify why ZEKom prescribed the time period of data retention that it did: the omission of the justification is unacceptable given that several member states prescribed shorter time periods within the manoeuvre space offered by the directive (§§26-27).

From the timeline of the Slovenian Court's decision process sketched above it seems that the Court might have simply been too late to submit a preliminary reference: the case was not fast-tracked and following the regular internal procedure, it reached the judges ten weeks after the hearing has been held in the Court of Justice. This, strictly legally speaking, would not prevent the Constitutional Court from requesting a preliminary ruling. However, the judges might have been put off solely by the uncertain fate of their reference and the possibility of dismissal of their case. Given that the Slovenian Constitutional Court has not yet submitted a reference for a preliminary ruling, one can imagine that there was a lot of reputation in the 'global community of courts' at stake.

Taking into account the fact that the Slovenian Court has not yet referred, this case, if anything, is proof that the reason for the inactivity is pragmatic rather than political. The readiness of the Court to stay proceedings and wait for the Court of Justice signals the relevance of EU law and Court of Justice case law for the Constitutional Court. Despite the laconic reservation, last expressed in the September Order (that jurisdiction to review implementation acts is not excluded), the data retention case is, if anything, a case of importing the ECJ's arguments into the decision of the Constitutional Court. As we have shown above, the Constitutional court acknowledged that it read not only the judgment of the Court of Justice, for which it patiently waited, but also the Opinion of the Advocate General.

It is far more likely that the course of action as chosen by the Constitutional Court is a matter of workload management. This can be observed from the perspectives of both courts. The Slovenian Constitutional Court may have shaken off the unbearably high caseload that it experienced around 2007 but it still received more than 1,300 cases in 2013. It is a court that not only hears constitutional complaints and thus enforces human rights in the judicial system but is also often seized by political actors and presented with issues that attract massive public attention. This has become an important staple of the Court's work with the eruption of the economic crisis in 2008 and has been fueled by the political crisis, looming since approximately 2011.[1] It is imaginable that accepting the result of direct dialogue between another constitutional court and the Court of Justice would content a court that has plenty on its plate.

From the angle of the Court of Justice, the approach of the Slovenian Constitutional Court in this particular case has been praised in a paper by Ludovica Benedizione of the University of Bari and Eleonora Paris of the University of Teramo. They recognized that if this approach became a trend, the number of preliminary references could decrease, which would contribute to more effective functioning of the European judicial system.[2]

Undoubtedly, the overburdening of the Court of Justice is a serious issue that puts in question the reference for a preliminary ruling as a feasible tool for the dialogue between courts in Europe. The preliminary rulings coming from Constitutional Courts, however, should be distinguished. First, because of the relevance of the cases they can bring to Luxembourg – and data retention is a prime example. In cases of constitutional relevance, it is vital that a variety of arguments is put forward and that all of the concerns stemming from national constitutional discussions are considered. And the latter is of essence for European constitutionalism. Constitutional traditions common to the Member States remain a source of fundamental rights that are the general principles of EU law. And the Court of Justice, when defining the fundamental rights of Europe, should be listening to as many authoritative constitutional voices from the Member States as possible.

At the same time, it is not only the overburdening of the European Court of Justice but also of the national constitutional court that can have equally serious consequences. Backlogs can have a severe detrimental effect on legal certainty within the legal system as a whole and, in individual cases, on the freedom or well-being of the people waiting for the judgment. In cases such as the referendum day case mentioned in the footnote above, the whole country's political life can come to a standstill waiting for the verdict to be passed. It is of paramount importance that the constitutional court manages its resources well, prepared to deal with such situations. Nevertheless, the importance of references for a preliminary ruling in cases of high relevance for the standard of protection of fundamental rights should be recognized and reconciled with the attempts of the court to manage its workload.

In the Slovenian data retention case, the constitutional court acknowledged the relevance of the procedure before the Court of Justice to its own decision-making. At the same time, it found that the contested measures were in fact unconstitutional. If the court is to put the protection of fundamental rights into the ECJ's trust, it must at the same time continue to contribute the best it can to ensure the responsiveness of the Court of Justice to national constitutional concerns. In other words, it should be accepted that the mandate of a constitutional court to safeguard the constitution and the rights enshrined therein may extend to the court's participation in judicial dialogue.

[1] See for example case U-I-76/14 (Order of 10 April 2014) where the court was effectively made an umpire between the parliamentary majority that tried to hold a referendum on a day where many people are away on holiday, and the parliamentary minority that demanded it be held on the same day as the elections to the European Parliament.

[2] 'Preliminary reference and dialogue between courts: the case of the 'Data retention directive', Paper presented at The preliminary reference to the Court of Justice of the European Union by Constitutional Courts, Seminar in memoriam of Gabriella Angiulli, 28th-29th March 2014 (on file with author).

SUGGESTED CITATION Bardutzky, Samo: *The Timing of Dialogue: Slovenian Constitutional Court and the Data Retention Directive, VerfBlog,* 2014/9/10, http://verfassungsblog.de/timing-dialogue-slovenian-constitutional-court-data-retention-directive/.

On 3rd July 2014, the Slovenian Constitutional Court struck down Articles 162 – 169 of the Act on Electronic Communications (ZEKom-1) which regulate data retention and were adopted in order to implement the Directive 2006/24/EC. The case is of interest not so much for the legal argumentation presented in the judgment but because of the positioning of the Slovenian court in the Europe-wide judicial response to the Data Retention Directive. In that sense, it's a contribution to the discussion on the role of an individual constitutional court in a multi-level network of courts, especially in cases when a number of constitutional or other high courts in the member states are seized with issues stemming from the same piece of legislation.

The Court was seized by the Information Commissioner *(Informacijski pooblaščenec)*, an independent authority charged with the protection of personal data and access to documents on 5th March 2013. On 26th September 2013, the Constitutional Court stayed the proceedings until the decision of the Court of Justice of the EU in cases C-293/12 (Digital Rights Ireland) and C-594/12 (the referral by the Austrian Constitutional Court) . It asserted that

the Information Commissioner was *de facto* challenging the conformity of the Directive with the Charter of Fundamental Rights. The Slovenian Court, in the order with which it stayed the proceedings, first remarked that its own jurisdiction to review domestic measures implementing directive is not out of the question. However, the Court of Justice holds exclusive jurisdiction over the question of the validity of the Directive pursuant to Article 267/1/b of the TFEU. And given that the challenges to the constitutionality of the Slovenian legislative provisions in substance amount to a claim that the provisions of the Directive are not in conformity with Articles 7 and 8 of the Charter of Fundamental Rights, the decision on the validity of the Directive is 'of key relevance' for the review of constitutionality of the domestic legislative provisions (§8).

The Slovenian Court established that the cases on the validity of the Directive (C-293/12 and C-594/12) were pending at that moment; a hearing had been held and the Advocate General has been given a date until which he was to produce an opinion. The Slovenian Court found that it does hence not need to submit a preliminary reference, as the claims against the implementing legislation based on the Slovenian constitution in substance match the reasons considered in the case before the Court of Justice (§9). While the Constitutional Court does not need to submit a reference itself, it must nevertheless wait for the Court of Justice before it passes its own judgment (§10).

The Court of Justice held a hearing on 9th July 2013 and declared the Directive invalid on 8 th April 2014. On 3 rd July 2014, the Constitutional Court held a session and adopted its decision on the relevant articles of the domestic legislation. It also ordered the operators to destroy all information held on the basis of the annulled provisions immediately after the publication of the Constitutional Court decision.

In the main decision, the Constitutional Court found that with the annulment of the Directive, the obligation of the member state to transpose it into its domestic legal order has ceased to exist. Nevertheless, protection of personal data in electronic communication remains a matter for EU law: Directive 2002/58/EC allows for the Member States to adopt legislative measures encroaching upon the confidence of data in transit, including data retention, when this is necessary, appropriate and adequate in a democratic society to serve a number of legitimate aims (§12). This – in substance – corresponds to the Slovenian constitutional requirement for a proportionality test to be applied when the right to information privacy (Article 38/I Constitution) is encroached upon (§13). The Constitutional Court therefore starts from the premise that the Slovenian legislature is not barred by EU law to adopt measures including data retention when they fulfill the requirements of rule of law under the Slovenian Constitution. Its primary task is therefore to assert whether in the absence of the obligation created for the national legislature by the 2006 Directive, the legislation may nevertheless remain in the legal system – from the view point of the Slovenian Constitution.

The substantive review can then be divided in two essential parts. In the first part, the Constitutional Court responds to the central claim of the Information Commissioner: that retention of data without any cause on the side of the persons affected is disproportionate. This part, in the words of the Slovenian court, 'matches in substance' the review of the Directive against the yardstick of the EU Charter. In the second part, the Court reviews two features of the implementing legislation that are country-specific.

In the first part of the review, the Constitutional Court relies heavily on the argumentation of the Court of Justice in C-293/12 and C-594/12. It performs a proportionality test, first finding that there is a legitimate aim for the contested measures that can be linked back to the constitutional duty of the State to protect human rights on its territory (Article 5 Constitution) and in that name also prosecute crimes (§§18-19). In finding the measures appropriate, the Court looks not only into the Commission's Evaluation report and the analysis of the Slovenian Government, but also cites the Court of Justice, i.e. its finding that the data retained was a 'valuable tool for criminal investigations'. The Court's handling of the necessity test was influenced both by findings of AG Cruz-Villalon (on the size of the databases and the risk for unauthorized access or abuse; the Court emphasized that the AG's argument was based ECHR case law) as well as the German Federal Constitutional Court in its judgment on data retention (§§24-25).

In the second part of the review, the Constitutional Court addressed the issues that were related to the way the Directive was implemented in the Slovenian legal system. Importantly, the Court found that the Slovenian Government failed to justify why ZEKom prescribed the time period of data retention that it did: the omission of

the justification is unacceptable given that several member states prescribed shorter time periods within the manoeuvre space offered by the directive (§§26-27).

From the timeline of the Slovenian Court's decision process sketched above it seems that the Court might have simply been too late to submit a preliminary reference: the case was not fast-tracked and following the regular internal procedure, it reached the judges ten weeks after the hearing has been held in the Court of Justice. This, strictly legally speaking, would not prevent the Constitutional Court from requesting a preliminary ruling. However, the judges might have been put off solely by the uncertain fate of their reference and the possibility of dismissal of their case. Given that the Slovenian Constitutional Court has not yet submitted a reference for a preliminary ruling, one can imagine that there was a lot of reputation in the 'global community of courts' at stake.

Taking into account the fact that the Slovenian Court has not yet referred, this case, if anything, is proof that the reason for the inactivity is pragmatic rather than political. The readiness of the Court to stay proceedings and wait for the Court of Justice signals the relevance of EU law and Court of Justice case law for the Constitutional Court. Despite the laconic reservation, last expressed in the September Order (that jurisdiction to review implementation acts is not excluded), the data retention case is, if anything, a case of importing the ECJ's arguments into the decision of the Constitutional Court. As we have shown above, the Constitutional court acknowledged that it read not only the judgment of the Court of Justice, for which it patiently waited, but also the Opinion of the Advocate General.

It is far more likely that the course of action as chosen by the Constitutional Court is a matter of workload management. This can be observed from the perspectives of both courts. The Slovenian Constitutional Court may have shaken off the unbearably high caseload that it experienced around 2007 but it still received more than 1,300 cases in 2013. It is a court that not only hears constitutional complaints and thus enforces human rights in the judicial system but is also often seized by political actors and presented with issues that attract massive public attention. This has become an important staple of the Court's work with the eruption of the economic crisis in 2008 and has been fueled by the political crisis, looming since approximately 2011.[1] It is imaginable that accepting the result of direct dialogue between another constitutional court and the Court of Justice would content a court that has plenty on its plate.

From the angle of the Court of Justice, the approach of the Slovenian Constitutional Court in this particular case has been praised in a paper by Ludovica Benedizione of the University of Bari and Eleonora Paris of the University of Teramo. They recognized that if this approach became a trend, the number of preliminary references could decrease, which would contribute to more effective functioning of the European judicial system.[2]

Undoubtedly, the overburdening of the Court of Justice is a serious issue that puts in question the reference for a preliminary ruling as a feasible tool for the dialogue between courts in Europe. The preliminary rulings coming from Constitutional Courts, however, should be distinguished. First, because of the relevance of the cases they can bring to Luxembourg – and data retention is a prime example. In cases of constitutional relevance, it is vital that a variety of arguments is put forward and that all of the concerns stemming from national constitutional discussions are considered. And the latter is of essence for European constitutionalism. Constitutional traditions common to the Member States remain a source of fundamental rights that are the general principles of EU law. And the Court of Justice, when defining the fundamental rights of Europe, should be listening to as many authoritative constitutional voices from the Member States as possible.

At the same time, it is not only the overburdening of the European Court of Justice but also of the national constitutional court that can have equally serious consequences. Backlogs can have a severe detrimental effect on legal certainty within the legal system as a whole and, in individual cases, on the freedom or well-being of the people waiting for the judgment. In cases such as the referendum day case mentioned in the footnote above, the whole country's political life can come to a standstill waiting for the verdict to be passed. It is of paramount importance that the constitutional court manages its resources well, prepared to deal with such situations. Nevertheless, the importance of references for a preliminary ruling in cases of high relevance for the standard of protection of fundamental rights should be recognized and reconciled with the attempts of the court to manage its workload.

In the Slovenian data retention case, the constitutional court acknowledged the relevance of the procedure before the Court of Justice to its own decision-making. At the same time, it found that the contested measures were in fact unconstitutional. If the court is to put the protection of fundamental rights into the ECJ's trust, it must at the same time continue to contribute the best it can to ensure the responsiveness of the Court of Justice to national constitutional concerns. In other words, it should be accepted that the mandate of a constitutional court to safeguard the constitution and the rights enshrined therein may extend to the court's participation in judicial dialogue.

[1] See for example case U-I-76/14 (Order of 10 April 2014) where the court was effectively made an umpire between the parliamentary majority that tried to hold a referendum on a day where many people are away on holiday, and the parliamentary minority that demanded it be held on the same day as the elections to the European Parliament.

[2] 'Preliminary reference and dialogue between courts: the case of the 'Data retention directive', Paper presented at The preliminary reference to the Court of Justice of the European Union by Constitutional Courts, Seminar in memoriam of Gabriella Angiulli, 28th-29th March 2014 (on file with author).

SUGGESTED CITATION Bardutzky, Samo: *The Timing of Dialogue: Slovenian Constitutional Court and the Data Retention Directive, VerfBlog,* 2014/9/10, http://verfassungsblog.de/timing-dialogue-slovenian-constitutional-court-data-retention-directive/.